

FILED

OCT 30 2018

Clerk, U.S. District Court
District Of Montana
Great Falls

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

LEWIS ELDON HUFFINE,

Petitioner,

vs.

JAMES CASHELL – GALLATIN
SHERIFF; LEROY KIRKEGARD;
JIM SALMONSON; TIM FOX;
STEVE BULLOCK; JOHN BROWN,

Respondents.

Cause No. CV 18-61-BU-BMM-JCL

RECOMMENDATION
and
ORDER

The Court issued Findings and Recommendation on September 18, 2018, concluding that Petitioner Huffine's petition under 28 U.S.C. § 2254 should be dismissed as an unauthorized second or successive petition. On September 18, 2018, the Court issued supplemental Findings and Recommendation.

Although Huffine has not said so, it has come to the Court's attention that he was convicted in 2015 of four new charges. *See State v. Huffine*, No. DA 16-0087 (Mont. July 17, 2018) (remanding for consideration of speedy trial claim). As he does not mention this conviction in his filings in this case, it is not implicated here. If Huffine intends to challenge his new conviction, he may certainly do so. As to the petition filed in this action, however, the Court lacks jurisdiction and cannot proceed. *See Burton v. Stewart*, 549 U.S. 147, 149 (2007) (per curiam).

A more elementary problem also exists. The filing fee for a habeas action is \$5.00. *See* 28 U.S.C. § 1914(a). Persons unable to pay the filing fee may be permitted to proceed in forma pauperis. *See* 28 U.S.C. § 1915(a). Despite notice he must do so, *see* Findings and Recommendation (Doc. 2) at 1–2; Supp. Findings and Recommendation (Doc. 4) at 2 ¶ 1, Huffine has neither moved to proceed in forma pauperis nor paid the fee.

Huffine asserts he has “been granted in forma pauperis in all cases BUT ONE misquoted by [Judge] Sam Haddon and [has] REPEATEDLY filed to proceed in forma pauperis wherein ALL HAVE BEEN DENIED FILING BY CLERK PATRIC[K] DUFFY-DENY ACCESS.” Supp. (Doc. 7) at 1.

This statement is false. Huffine has not been granted in forma pauperis status in any of the several habeas actions he has filed in this Court. He argued that a filing fee is unconstitutional. *See, e.g.,* Am. Pet. (Doc. 3) at 1, 12, Recommendation and Order (Doc. 4), *Huffine v. Law*, No. CV 10-24-BU-SEH-RKS (D. Mont. opened May 13, 2010); Am. Pet. (Doc. 3) at 1, Recommendation and Order (Doc. 4), *Huffine v. State of Montana*, No. CV 09-63-BU-SEH-RKS (D. Mont. opened May 27, 2009); Objection (Doc. 7), Order (Doc. 8), *Huffine v. Yellowstone County Detention Facility*, No. CV 07-85-BLG-RFC-CSO (D. Mont. opened June 19, 2007). On the two occasions when Huffine moved to proceed in forma pauperis in a habeas action, his motions were denied because he failed to

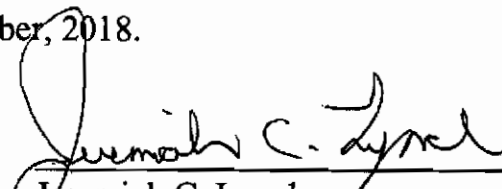
demonstrate inability to pay. *See* Mot. to Proceed In Forma Pauperis (Doc. 3), Recommendation and Order (Doc. 6), *Huffine v. Bullock*, No. CV 12-14-BU-DLC-JCL (D. Mont. opened Mar. 12, 2012); Mot. to Proceed In Forma Pauperis (Doc. 3) at 1, (Doc. 3-1) at 1, Findings and Recommendation (Doc. 4) at 2–3, Order (Doc. 5), *Huffine v. Cashell*, No. CV 08-14-BU-SEH-RKS (D. Mont. opened Mar. 4, 2008).

Huffine’s petition should be dismissed for failure to pay the filing fee and failure to move to proceed in forma pauperis. A certificate of appealability should be denied. Reasonable jurists could only conclude that habeas petitioners must pay the filing fee or move to proceed in forma pauperis and that Huffine has had sufficient notice of this fact. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Huffine is not entitled to object to this recommendation. *See Minetti v. Port of Seattle*, 152 F.3d 1113, 1114 & n.1 (9th Cir. 1998) (per curiam).

Accordingly, the Court RECOMMENDS that Judge Morris should enter the following order.

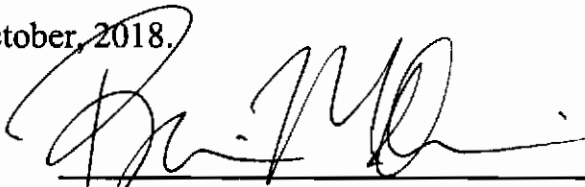
DATED this 26th day of October, 2018.


Jeremiah C. Lynch
United States Magistrate Judge

ORDER

1. The petition is DISMISSED for failure to pay the \$5.00 filing fee or move to proceed in forma pauperis.
2. A certificate of appealability is DENIED.
3. The clerk is directed to enter, by separate document, a judgment of dismissal.

DATED this 29th day of October, 2018.

A handwritten signature in black ink, appearing to read 'Brian M. Morris', is written over a horizontal line.

Brian M. Morris
United States District Court